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IN THE

Supreme Court of the United States

October Term, 1970

No. 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

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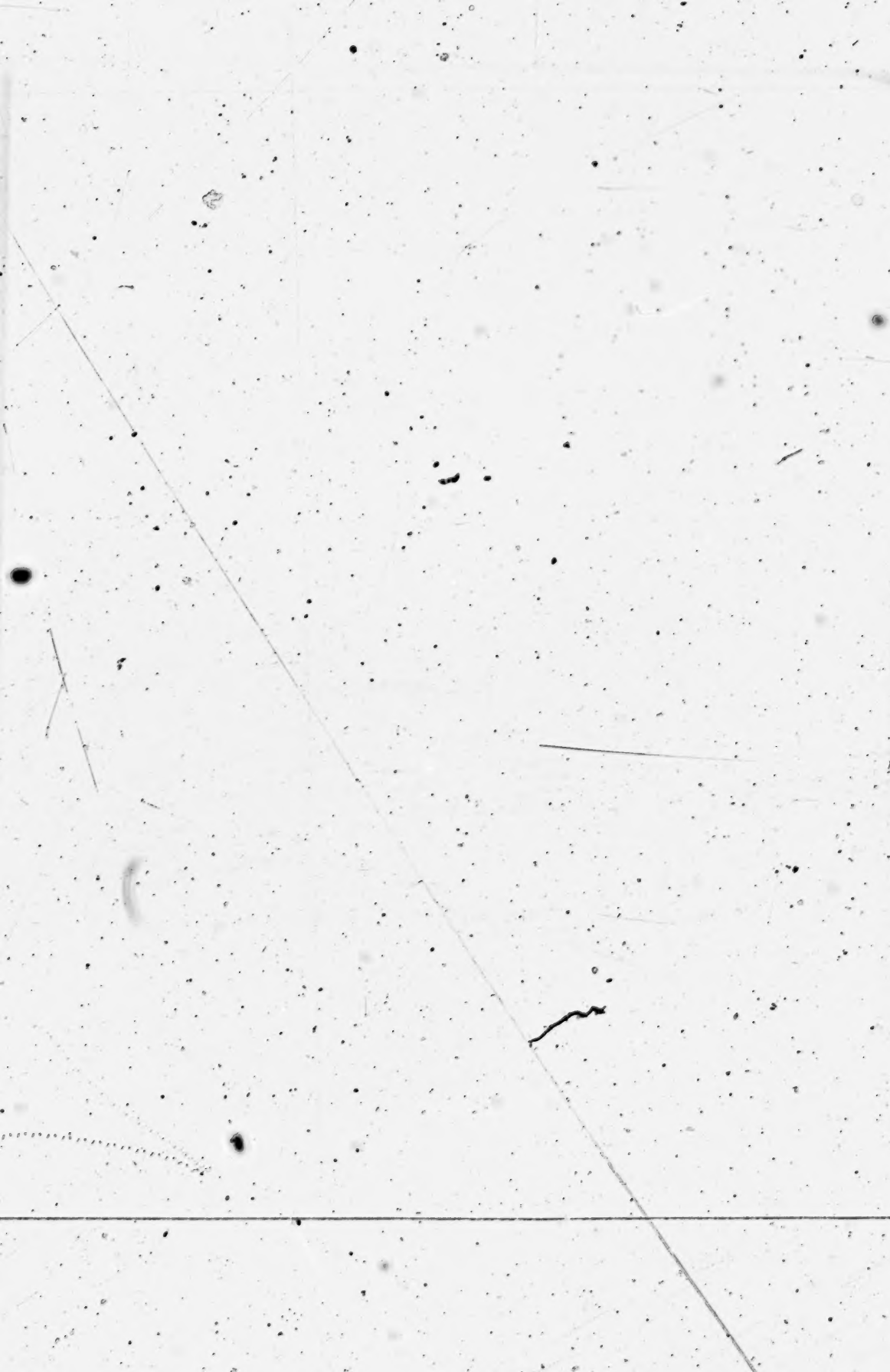

IN THE

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No. 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Motion Picture Association of America, Inc., hereby respectfully moves for leave to file as *amicus curiae* in this case the brief appended hereto. The consent of the attorneys for the Appellants has been obtained. On June 26, 1970, movant wrote the attorney for the Appellee. A copy of that letter and the reply is appended below.

Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and distributors of motion pictures in the United States, to wit:

Allied Artists Pictures Corporation
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer, Inc.
Paramount Pictures Corporation

Twentieth Century-Fox Film Corp.
United Artists Corporation
Universal Pictures, a division of
Universal City Studios, Inc.
Warner Bros., Inc.

MPAA takes no position on the merits of the specific controversy involving the attempt to exhibit "I Am Curious —Yellow" in the State of Maryland. It believes that the merits of that specific controversy will be adequately briefed and argued by the parties.

However, Appellants' Jurisdictional Statement and Appellee's Motion to Dismiss or Affirm have raised two additional questions of more general significance to the entire motion picture industry. These are: (1) the continued constitutional validity of permitting motion pictures, unlike any other medium of expression, to be subjected to prior restraint, and (2) the appropriate constitutional standard by which the obscenity of motion pictures is to be judged. Any decision by this Court on these questions will vitally affect the constitutional interests of MPAA's member companies, as well as all other producers, distributors and exhibitors of motion pictures in the United States.

Because MPAA believes that the general issues raised in this case are of vital concern to the entire motion picture industry, including its member companies, it respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

LOUIS NIZER
Attorney for Motion Picture Association of America, Inc., Amicus Curiae

BARBARA SCOTT
JAMES BOURAS
of Counsel

APPENDIX A

MOTION PICTURE ASSOCIATION OF AMERICA, INC.
522 Fifth Avenue
New York, N. Y. 10036

June 26, 1970

Mr. Thomas N. Biddison, Jr.
Assistant Attorney General
of Maryland
1200 One Charles Center.
Baltimore, Maryland 21201

Re: Grove Press, Inc. v. Maryland State Board
of Censors (Supreme Court 905).

Dear Mr. Biddison:

The Motion Picture Association is a trade association representing the major producers and distributors of motion pictures. Its members include:

Allied Artists Pictures Corp.
Avco-Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer, Inc.
Paramount Pictures Corp.
Twentieth Century-Fox Film Corp.
United Artists Corp.
Universal Pictures

Because of the interest of the members of the Association in the constitutionality of the Maryland Statute establishing the Maryland Board of Censors, the Motion Picture Association is desirous of filing a brief amicus curiae in support of appellants Grove Press, Inc. et al. in the action now pending before the Supreme Court, Grove Press, Inc. v. Maryland State Board of Censors (905).

Appendix A

May we have your consent on behalf of the Maryland State Board of Censors to the filing by the Motion Picture Association of a brief amicus curiae?

With best wishes,

Sincerely yours,

Barbara Scott
BARBARA SCOTT
Deputy Attorney

BS:wc

Appendix A

THE ATTORNEY GENERAL
1200 One Charles Center
Baltimore, Md. 21201

July 7, 1970

M's Barbara Scott
Deputy Attorney
Motion Picture Association of America, Inc.
522 Fifth Avenue
New York, N. Y. 10036

Re: Grove Press, Inc. v. Maryland State Board of Censors (Supreme Court 905)

Dear M's Scott:

I am sorry we are unable to grant our consent to your filing an amicus curiae brief in the above captioned matter.

Very truly yours,

Thomas N. Biddison, Jr.
THOMAS N. BIDDISON, JR.
Assistant Attorney General

TNB:k

IN THE

Supreme Court of the United States

October Term, 1970

No. 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellees.

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *Amicus* is set forth in the Motion for Leave to File this brief, *supra.*

ARGUMENT

I.

There is no longer any valid constitutional basis upon which to permit motion pictures, unlike any other medium of expression, to be subjected to prior restraint.

Motion pictures are currently the only medium of communication which this Court has permitted to be subjected to prior restraint.[1] The premise upon which this differ-

[1] Prior restraints have been forbidden with respect to newspapers (*Near* v. *Minnesota*, 283 U.S. 697), magazines (*Hannegan* v. *Esquire, Inc.*, 327 U.S. 146), books (*Bantam Books* v. *Sullivan*,

entiation of treatment between motion pictures and other media has been based is by no means clear. In the three previous cases in which this issue was before this Court, the Court has only indicated that there is a "difference". For instance, in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952), this Court held that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." Nevertheless, the Court added that ". . . it [does not] follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." *Id.* at 502-503.

In *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961), again without any adequate articulation of the reason or reasons why motion pictures should be regarded as "different," the Court held that a requirement that films be submitted for approval in advance of their public exhibition was not unconstitutional *per se*.

In *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the Court held that a system requiring administrative review and approval of films prior to their public exhibition would be valid only if it included certain procedural safeguards. However, the Court reiterated its previously expressed view that prior restraint of motion pictures was not unconstitutional *per se* because ". . . films differ from other forms of expression." *Id.* at 61.

None of these opinions, however, contains any indication of the way or ways in which motion pictures

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372 U.S. 558), handbills (*Lovell* v. *Griffin*, 303 U.S. 444; *Talley* v. *California*, 362 U.S. 60; *Schneider* v. *State*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U.S. 296), the spoken word (*Saia* v. *New York*, 334 U.S. 558; *Niemotko* v. *Maryland*, 340 U.S. 268; *Kunz* v. *New York*, 340 U.S. 290, 294, 295), and broadcasting (*Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 3rd Cir. 1950, cert. den. 340 U.S. 929; c.f. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969)).

"differ" from other media of expression, why these differences are of constitutional significance, the precise way in which they are relevant in determining constitutionally permissible methods of community control, and the reasons why they justify subjecting motion pictures to prior restraint while no other form of expression is subject to such control.

While motion pictures in their infancy may have been regarded by the courts and public alike as "a business pure and simple," *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U.S. 230, 244 (1915), this is most assuredly no longer true. Motion pictures today enjoy a status equivalent to that of literature and are being studied and written about critically to a greater extent than ever before. Most major universities in the United States today offer courses in film appreciation and film technique.[2] To say that they have become *the* art form of our time, as many have already said,[3] is

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[2] The American Film Institute's Guide to College Film Courses 1969-70 shows that 219 institutions of higher learning now offer courses in film, representing an 84 percent increase during the past five years. Fifty-one of these institutions offer not just courses, but also degrees in film.

[3] See *MD* (September, 1966, page 160) for the assertion that "Cinema is the only major art form developed in the 20th century, and in many ways it is the most characteristic art of the age." See also, e.g., Stanley Kauffmann, "A World on Film" (New York: Harper & Row, 1966), pages 415-428. The late renowned art critic Erwin Panofsky wrote: "Film art is the only art the development of which men now living have witnessed from the very beginnings." And "it might be said that a film, called into being by a cooperative effort in which all contributions have the same degree of permanence, is the nearest modern equivalent of a mediaeval cathedral: the role of the producer corresponding, more or less, to that of the bishop or archbishop; that of the director to that of the architect-in-chief; that of the scenario writers to that of the scholastic advisers establishing the iconographical program; and that of the actors, camera men, cutters, sound men, make-up men and the divers technicians to that of those whose work provided the physical entity of the finished product, from the sculptors, glass painters, bronze casters, carpenters and skilled masons down to the quarry men and woodsmen." *Critique*, Vol. 1, No. 3; January-February, 1947.

not to overstate the case. To say that the scope of their constitutional protection must continue to be governed by public and judicial attitudes which might have been prevalent 20 or 30 years ago is to preclude any constitutional development, a course which this Court refused to follow in *Joseph Burstyn, Inc. v. Wilson, supra,* and which it should refuse to follow now.

In short, we believe that whatever justifications *might* have existed in the past, there is no longer any valid constitutional basis for permitting prior restraint insofar as motion pictures are concerned while at the same time not permitting prior restraint of any other medium of expression.[4]

Maryland is today the only state in the United States which retains a formal board of censors to which all films must be submitted for review, approval and licensing prior to their public exhibition.[5] Following this Court's decision

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[4] If the justification is premised on the Court's concept of the differences in marketing, availability, etc., of motion pictures as opposed to other media, these considerations will be dealt with *infra,* pp. 14-16.

[5] Since 1965, censorship laws in the states of New York, Virginia and Kansas and the cities of Chicago and Memphis have all been declared unconstitutional and have not been re-enacted in amended form. *In the Matter of Trans-Lux Distributing Corp. v. Board of Regents of the University of the State of New York,* 16 N.Y.2d 710, 261 N.Y.S.2d 903, 209 N.E.2d 558 (1965); *Victoria Films, Inc. v. Division of Motion Picture Censorship,* Circuit Court of the City of Richmond, Virginia, Case No. B-2907 (letter opinion of Judge John Wingo Knowles dated April 15, 1965) (not officially reported); *State of Kansas v. Columbia Pictures Corp.,* 197 Kan. 448, 417 P.2d 255 (1966); *Teitel Film Corp. v. Cusack,* 390 U.S. 139 (1968) (per curiam); *Embassy Pictures Corp. v. Hudson,* 242 F.Supp. 975 (W.D. Tenn. 1965). See also: *Trans-Lux Distributing Corp. v. Regents,* 380 U.S. 259 (1965) (per curiam).

A semblance of board-type censorship continues to exist in the City of Detroit, where the Detroit License and Censor Bureau, a division of the City's Police Department, screens and licenses films

in *Freedman* v. *Maryland, supra,* the Maryland censorship statute was amended in an attempt to comply therewith. Since that time, eight film censorship cases have reached the Court of Appeals of Maryland. The censors have lost five of these cases,[6] and have won three,[7] including their present attempt to prevent the exhibition of "I Am Curious —Yellow."[8]

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prior to their public exhibition. Screenings are held before policemen, who sometmes license films for exhibition only at certain theatres.

In addition, the City of Milwaukee maintains a citizens' Motion Pictures Commission, with whose recommendations local exhibitors in most cases comply. However, there is no sanction for failure to observe a recommendation by the Commission.

Finally, the City of Providence licenses theatres on a weekly basis through its Bureau of Licenses, with the grant or refusal of the license being based on the film which is to be shown during the week for which the license is sought. If the members of the Bureau find probable cause to believe that a particular film is obscene, they must go to court to seek an injunction against its exhibition.

[6] *Trans-Lux Distributing Corp.* v. *Maryland State Board of Censors,* 240 Md. 98, 213 A.2d 235 (1965) ("A Stranger Knocks"); *Dunn* v. *Maryland State Board of Censors,* 240 Md. 249, 213 A.2d 751 (1965) ("Lorna"); *Hewitt* v. *Maryland State Board of Censors,* 241 Md. 283, 216 A.2d 557 (1966) ("This Picture is Censored"); *Leighton* v. *Maryland State Board of Censors,* 242 Md. 705, 218 A.2d 179 (1966) ("The Dirty Girls"); *Hewitt* v. *Maryland State Board of Censors,* 243 Md. 574, 221 A.2d 894 (1966) ("This Picture is Censored") (second case involving this film).

[7] *Sanza* v. *Maryland State Board of Censors,* 245 Md. 319, 226 A.2d 317 (1967) ("peep show" films); *Hewitt* v. *Maryland State Board of Censors,* 254 Md. 179, 254 A.2d 203 (1969) ("Odd Tastes"); *Wagonheim* v. *Maryland State Board of Censors,* 255 Md. 297, 258 A.2d 240 (1969) ("I Am Curious—Yellow").

[8] However, the Maryland State Board of Censors has licensed for exhibition "Yellow's" parallel film, "I Am Curious—Blue." *Motion Picture Daily,* July 6, 1970, page 1, column 1.

In its fiscal year 1969, the Maryland State Board of Censors reviewed a total of 687 motion pictures, of which it cut 14 and rejected 59. (*Time Magazine*, March 9, 1970, page 20, columns 1-3.) Half of those rejected were 8-mm. films (*Ibid.*), presumably of the type found to be obscene in *Sanza* v. *Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967), which are not shown in regular commercial motion picture theatres. It is impossible to determine whether court proceedings were commenced and the 59 pictures rejected outright were actually adjudicated to be obscene, as required by *Freedman* v. *Maryland*, *supra*, and Section 19 of the censorship statute, or whether the persons submitting some or all of the 59 pictures rejected indicated that they would acquiesce in the Board's decisions and did not wish to go to court.

Neverthless, despite the fact that the Maryland State Board of Censors rejected less than five percent of the *theatrical* films submitted to it during fiscal 1969, Maryland continues to require that *all* films be submitted for review and approval prior to their public exhibition. In effect, the requirement that *all* films be submitted for review and approval indicates a presumption that *all* films are suspect, a presumption which is both "irrational" and "arbitrary." *Leary* v. *United States*, 395 U.S. 6, 36 (1969); *Morrison* v. *Wilson*, 307 F.Supp. 196, 198-199 (N.D.Fla. 1969). Moreover, it is extremely doubtful that any kind of restrictive presumption is constitutionally permissible in the First Amendment area. *Speiser* v. *Randall*, 357 U.S. 513, 523-524 (1958); *Ginsberg* v. *New York*, 390 U.S. 629, 631 n.1 (1968). Be that as it may, in view of the limited number of motion pictures which the Board has banned entirely and presumably will be able to ban in the future, there can no longer be any constitutional justification for a statute requiring the submission of *all* films for review and approval prior to their public exhibition. "I Am Curious—Yellow" may present one exceptional case, but to require the latest film from Walt Disney Productions to be subjected to the same advance scrutiny is plainly ridiculous.

Even the system of classification by prior review which was before this Court in *Interstate Circuit* v. *Dallas*, 390 U.S. 676 (1968), did not require the submission of *all* films for review and classification prior to exhibition. Under the ordinance involved in the *Interstate* case, only those films about the propriety of whose classification the Dallas Motion Picture Classification Board had some question were screened by the Board.[9]

We recognize the State of Maryland's legitimate interest in preventing the exhibition of obscene films. *Roth* v. *United States*, 354 U.S. 476 (1957). However, we believe that legitimate interest can adequately be served by compelling the state to resort to the ordinary criminal process or to a declaratory-injunctive process similar to that approved by this Court in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957). Unlike the current Maryland film censorship statute, both of these alternative processes are designed to focus attention on the specific material alleged to be obscene and do not impede, even temporarily, the free distribution of material about whose lack of obscenity there can be no question.

Recent decisions clearly indicate that, even where the ordinary criminal process or a declaratory-injunctive remedy is employed, the free distribution of specific material alleged to be obscene cannot be impeded unless there has first been a convincing showing in an adversary hearing that there is at least probable cause to believe that the material is obscene. See, e.g., *Tyrone, Inc.* v. *Wilkinson*, 294 F.Supp. 1330 (E.D.Va. 1969), aff'd, 410 F.2d 639

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[9] Systems of classification by prior review similar to that involved in the *Interstate* case are now in effect in the State of Rhode Island and the City of Dallas.

In addition, the City of Chicago maintains a classification system under which all films intended for exhibition to persons under the age of 18 years must be submitted for review and approval. If a particular film is intended for exhibition to adults only, it need not be submitted.

(4th Cir. 1969), cert. denied, 396 U.S. 985 (1969); *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969), cert. denied, 397 U.S. 920 (1970); *Veryari* v. *208 Cinema, Inc.*, cert. denied, 397 U.S. 934 (1970); *Fontaine* v. *Dial*, 303 F.Supp. 436 (W.D.Tex. 1969), appeal dismissed for want of jurisdiction, — U.S. — (1970); *Delta Book Distributors, Inc.* v. *Cronvich*, 304 F.Supp. 662 (E.D. La. 1969), probable jurisdiction noted on other questions *sub nom. Perez* v. *Ledesma*, — U.S. — (1970); *Gundlach* v. *Rauhauser*, 304 F.Supp. 962 (M.D.Pa. 1969) (per curiam); *Entertainment Ventures, Inc.* v. *Brewer*, 306 F.Supp. 802 (M.D.Ala. 1969); *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (2d Cir. 1970); *Cambist Films, Inc.*, v. *Duggan*, 420 F.2d 687 (3d Cir. 1969); and countless other decisions, both reported and unreported, to the same effect.

By contrast, the Maryland film censorship statute indulges by implication the opposite assumption: a film's distribution is impeded and it cannot be exhibited unless and until it has first been determined not to be obscene. In view of the availability of alternative, equally effective methods of regulation which are much more sensitive to First Amendment freedoms, it is clear that the Maryland film censorship statute cannot stand. As this Court observed in *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960):

> "... even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

In holding Maryland's previous censorship law unconstitutional, this Court noted that any revised statute would be valid only if it were drafted "to avoid the potentially chilling effect" of the statute held unconstitutional. *Freedman* v. *Maryland*, *supra* at 61. The Court premised its discussion of possibly valid procedures upon the assump-

tion that "films are scheduled well before actual exhibition," that they could be submitted for review and approval well in advance of their scheduled exhibition, and that any litigation would be completed before the scheduled opening date so that "the most propitious opportunity for exhibition" would not be lost. *Ibid.* The Court's assumptions, unfortunately, were not altogether correct; they are in accord neither with the actual nature of contemporary motion picture distribution nor with the experience of distributors in dealing with the post-*Freedman* Maryland State Board of Censors. The production cost of a contemporary motion picture may be as high as $20 million. In order to secure an adequate return on his investment, and to avoid unnecessary interest expenses, a distributor must complete and release his picture as quickly and extensively as possible. This release is almost always preceded by extensive publicity of national scope, which only adds to the picture's cost. Therefore, even assuming that "films are scheduled well before actual exhibition," which is not always true, this does not mean that the film has been completed or that a print thereof is available for submission to the Maryland State Board of Censors. In fact, prints may not be available for submission to the Board of Censors until a few days before scheduled opening dates in Maryland, particularly in the City of Baltimore. To the extent that the Board of Censors interposes any objections to the film under submission or portions thereof, the distributor in most cases has no choice but to accede to the Board's demands or else lose "the most propitious opportunity for exhibition." In one post-*Freedman* case, for example, final judicial vindication of a film which the Board of Censors sought to ban took almost 10 months. *Hewitt* v. *Maryland State Board of Censors*, 241 Md. 283, 216 A.2d 557 (1966), 243 Md. 574, 221 A.2d 894 (1966). MPAA has been informed by its member companies that in at least three recent instances—involving "ZABRISKIE POINT" (M-G-M), "THE ADVEN-

TUBERS" (Paramount) and "BEYOND THE VALLEY OF THE DOLLS" (20th Century-Fox) — films have been cut to satisfy the Board of Censors rather than encounter the delays which would necessarily attend litigation, delays which would have lost "the most propitious opportunity for exhibition." For even though litigation may theoretically delay a film's opening by only a few days, it must be remembered that the exhibitor who had intended to show the film will in the interim have replaced it with another film which may play in his theatre for weeks or even months. We believe that the "chilling effect" which this Court found to be a vice of the previous Maryland statute continues unabated under the present film censorship law.[10]

Finally, it must be recognized that in its recent decisions this Court has de-emphasized judgment of obscenity *vel non* and has instead approached the question of obscenity in terms of the persons to whom allegedly obscene material is exhibited or sold, the possible obtrusiveness of its presentation, the manner in which it is advertised or promoted, and the intent with which it is possessed. See, e.g., *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam), and the numerous *per curiam* judgments based thereon; *Stanley v. Georgia*, 394 U.S. 557 (1969). The dominant constitutional philosophy would seem to be that states should direct their attention to the use to which allegedly obscene material is put, not to the material itself. In view of this, the State of Maryland would seem to have no exigent interest in maintaining a Board of Censors whose sole function is to examine in advance every film intended for exhibition within its jurisdiction to detect those few films which may be obscene for all purposes. See *United*

[10] Actually, except for the addition of Section 19, the present law is the same as the law involved in the *Freedman* case.

States v. *127,295 Copies of Magazines*, 295 F.Supp. 1186 (D. Md. 1968) (per curiam); *United States* v. *4,400 Copies of Magazines*, 276 F.Supp. 902 (D. Md. 1967). To the extent that the State of Maryland has a constitutionally legitimate interest in preventing the exhibition of certain films under any circumstances, that interest can more than adequately be served by means which avoid the "chilling effect" of the current motion picture censorship law and which are much more sensitive to First Amendment freedoms. Certainly, there has been no allegation that reliance on the ordinary criminal process has in any way thwarted the state's attempts to prevent the circulation of obscenity in other media, nor could there be.[11]

In short, we believe that upon "pragmatic assessment of its operation in the particular circumstances" *Kingsley Books, Inc. v. Brown*, *supra* at p. 442, there is no longer, if there ever was, a constitutionally valid basis upon which this Court can justify Maryland's system of prior restraint of motion pictures by an administrative licensing board. Boards of censors such as that maintained today only by the State of Maryland have become an anachronism, both historically and constitutionally. This Court should so hold.

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[11] See, e.g., *Levin* v. *State*, 246 Md. 139, 228 A.2d 487 (1967), cert. denied, 389 U.S. 1048 (1968); *Donnenberg* v. *State*, 232 A.2d 264 (Md. Ct. App. 1967); *Lancaster* v. *State*, 256 A.2d 716 (Md. Ct. App. 1969).

II.

The obscenity of motion pictures must be governed by the same standards which govern obscenity in any other medium of expression.

In its Motion to Dismiss or Affirm, the Maryland State Board of Censors advances the somewhat novel argument that the obscenity of motion pictures should be governed by standards different from those which govern other media of expression.

The Board of Censors purports to find support for its argument in certain previous decisions of this Court. However, as those decisions themselves make clear, the passages in question dealt solely with the constitutional justification for subjecting motion pictures to different *methods* of control. As we have argued above (Point I, *supra*), we believe there is no longer any valid constitutional basis for permitting motion pictures, unlike any other medium of expression, to be subjected to prior restraint. Nevertheless, even if this Court persists in finding a valid constitutional basis for differentiation of motion pictures insofar as *methods* of control are concerned, there is nothing in its previous decisions which suggests that the *substantive* standards under which the obscenity of motion pictures is to be judged may be different from those applicable to other media.

Insofar as the individual members of this Court have subscribed to particular tests of obscenity, they have always viewed them as being equally applicable to all media of expression, including motion pictures. See, e.g., *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957) (per curiam) ("The Game of Love"); *Jacobellis v. Ohio*, 378 U.S. 184 (1964) ("The Lovers"); *Ratner v. California*, 388 U.S. 442 (1967) (per curiam) ("Honey Bee"); *Cobert v. New York*, 388 U.S. 443 (1967) (per curiam) (various films); *Schackman v. California*, 388 U.S. 454 (1967) (per

curiam) (various films); *I. M. Amusement Corp.* v. *Ohio*, 389 U.S. 573 (1968) (per curiam) ("Artist's Models"); *Robert-Arthur Management Corp.* v. *Tennessee*, 389 U.S. 578 (1968) (per curiam) ("Mondo Freudo" and trailer for "Olga's Girls"); *Cain* v. *Kentucky*, 397 U.S. 319 (1970) (per curiam) ("I, A Woman").[12]

The constitutional test of obscenity adopted and relied upon by almost all state and lower federal courts is that enunciated in the opinion of Mr. Justice Brennan in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418-419 (1966):

> "... three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.
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> • • •
>
> "Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness."

This is the test which has been adopted by the Maryland Court of Appeals in obscenity cases, including motion picture cases. See, e.g., *Hewitt* v. *Maryland State Board of Censors*, 254 Md. 179, 254 A.2d 203 (1969). It clearly includes the requirement that films must be "utterly without redeeming social value" before they may be adjudged obscene. *Trans-Lux Distributing Corp.* v. *Maryland State Board of Censors*, 240 Md. 98, 104-105, 213 A.2d 235, 238-239 (1965). To the extent that a current majority of

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[12] In *Grove Press, Inc.* v. *Gerstein*, 378 U.S. 577 (1964), the Court, *per curiam*, decided that the Henry Miller novel "Tropic of Cancer" was not obscene on the basis of the decision that same day in *Jacobellis*, in which the Court decided the motion picture "The Lovers" was not obscene. The several Justices concurring and dissenting referred to their respective decisions in *Jacobellis*.

this Court might permit states greater latitude in finding certain material to be obscene, it is nevertheless clear that the Maryland Court of Appeals has remained within constitutional bounds in adopting and following the tripartite *Memoirs* formulation, that it was free to do so, and that its choice should not be disturbed by this Court.[13] See *Mishkin* v. *New York*, 383 U.S. 502, 507-508 (1966). In effect, what the Maryland State Board of Censors has asked this Court to do is to supersede the constitutionally-permissible test of obscenity adopted by the Maryland Court of Appeals, something which this Court has clearly indicated it will not do. *Ibid.*

In support of its argument that the constitutional standard governing the obscenity of motion pictures should be different from that governing other media, the Board of Censors cites *Landau* v. *Fording*, 245 Cal. App.2d 820, 54 Cal. Rptr. 177 (1966), judgment affirmed, 388 U.S. 456 (1967) (per curiam).[14] A reading of the lower court opinion in that case, however, clearly shows that, in finding the film in question ("Un Chant d'Amour") to be obscene, the court applied the tripartite *Memoirs* formulation. 245 Cal. App. 2d at 823-824. The court most emphatically did *not* hold that the constitutional guaranty was any different in the case of motion pictures, or that a different constitutional test of obscenity should be applied to motion pictures. Although the court intimated its view that, *under the same constitutional test*, "sexual scenes [in a motion picture] may transcend the bounds of the constitutional guaranty

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[13] This is not to imply any view as to whether the *Memoirs* formulation was correctly applied by the Maryland Court of Appeals to "I Am Curious—Yellow."

[14] Since this Court wrote no opinion in *Landau* it is impossible to determine whether its judgment of affirmance was based on a finding of obscenity *vel non* or whether the presence of pandering, as indicated in the opinion of the California Court of Appeals, rendered a film not otherwise obscene, obscene.

long before a frank description of the same scenes in the written word" (*Id.* at 827), this is not to say that the constitutional test itself is different or that it should be.

Similarly, in *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow"*, 404 F.2d 196 (2d Cir. 1968), it is clear that all three judges (including the dissenter) applied the tripartite *Memoirs* formulation. Again, although each judge intimated that a visual representation of sexual scenes may reach the threshold of obscenity more quickly than a written description of the same scenes (*Id.* at 198-199, 201, 203), the Government's argument that the constitutional test of obscenity itself should be different in the case of motion pictures was clearly regarded as an unwarranted "doctrinal innovation." *Id.* at 201.

Finally, in *P.B.I.C., Inc.* v. *Byrne*, — F.Supp. — (D. Mass. 1970), stay denied by an equally divided Court (4-4), — U.S. — (1970), it is recognized by both the majority and dissenting judges that the same constitutional test of obscenity, the tripartite *Memoirs* formulation, governs obscenity in all media of expression. (See particularly pages 11-13 of the typed majority opinion and pages 2-3 of the typed dissenting opinion.) In an opinion for himself and District Judge Bownes, Circuit Judge Coffin observed that:

> "... the enunciation of a different standard for every conceivable medium would only compound the confusion without ameliorating the delicacy of the basic judgments required by any standard." (Page 13 of typed majority opinion.)

We agree with Circuit Judge Coffin that any departure from a single standard governing obscenity in all media of expression "would only compound the confusion" which already exists in all areas of obscenity litigation. The argument by the Maryland State Board of Censors that a different constitutional test of obscenity should govern motion pictures, as opposed to other media, should be rejected by this Court.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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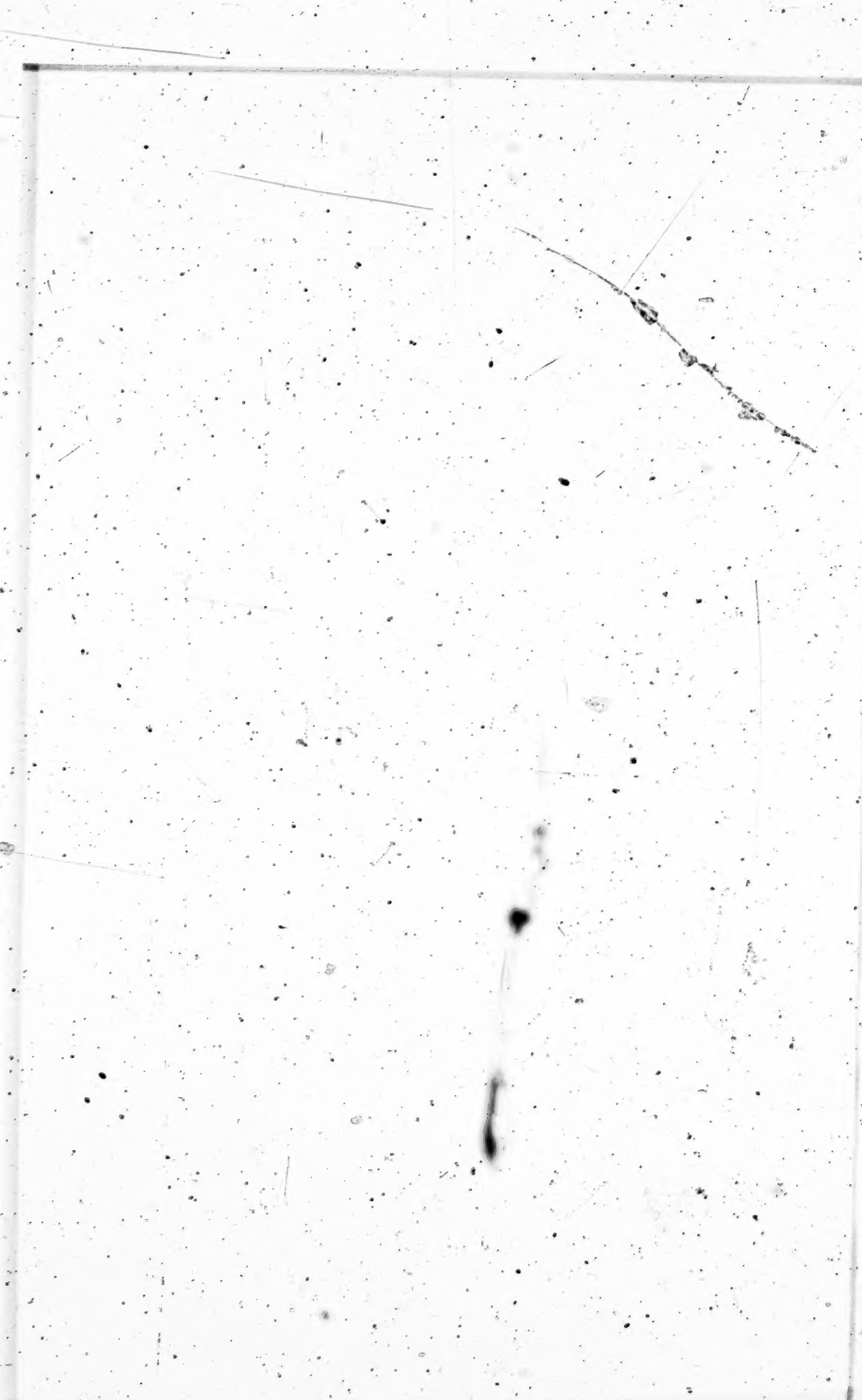

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IN THE

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OCTOBER TERM, 1970

No. 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC., *Appellants*

v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*

On Appeal From the Court of Appeals of Maryland

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